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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1158

THOMAS F. JOHNSON,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, through his counsel herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction for allegedly defrauding the United States and for receiving payments, while being a member of Congress, for representing another person before the Department of Justice in violation of 18 U.S.C.A. § 281 (since amended).

OPINIONS BELOW

The current opinion of the court of appeals (Appendix A, infra) is not yet officially reported. The original opinion of the district court is reported at 215 F. Supp. 300, an intermediate opinion of the United States Court of Appeals for the Fourth Circuit is reported at 337 F.2d 180, and an earlier opinion of this Court at 383 U.S. 169.

JURISDICTION

The judgment of the court of appeals appealed from herein was entered December 9, 1969, and a copy thereof is attached hereto as Appendix B; and on December 31, 1969, Justice Douglas of this Court extended the time for filing a petition for a writ of certiorari to and including February 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

May the conviction of appellant be sustained upon seven (7) substantive counts of his indictment upon his retrial upon said counts after (a) an original conviction thereupon was reversed because the petit jury's verdict of guilty on all eight (8) of the original counts of said indictment was found upon appeal to have resulted from bias infecting said verdict, such bias having been created by a mass of evidence and comment inadmissible against appellant for constitutional reasons, and (b) which reversal was affirmed by this Honorable Court, when,

1. Prior to such retrial, appellant timely moved to dismiss the entire indictment, setting forth the findings of infection of the petit jury's verdict, and other matters of believed bias and infection of the grand jury's deliberations, and

2. His motion to examine the grand jury minutes to determine whether or not they were also so infected as to warrant dismissal of the indictment, and

3. When neither the District Court nor the Court of Appeals even looked at or viewed the grand jury minutes, denied appellant access to the same, and without so viewing, ruled upon appellant's motion to quash the indictment returned by that grand jury?

Appellant submits that such action is contrary to *Dennis v. United States*, 384 U.S. 855, and *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395; or in conflict with rulings of other Circuits i.e. *Allen v. United States*, 390 F.2d 476 (D.C. Circuit 1968).

STATEMENT

On October 16, 1962, appellant, then a member of Congress, was indicted by a grand jury in the United States District Court for the District of Maryland under an eight (8) count indictment. The first count charged a conspiracy to defraud the United States and the remaining seven (7) charged overt acts between appellant, other defendants and co-conspirators.[1]

The similarity between the averments of Count One (1), the conspiracy charge, and Counts Two (2) through Eight (8) inclusive, the overt acts, are summarized for comparison in columns hereinafter.

Appellant was originally found guilty by a petit jury upon all eight (8) counts of the indictment. He appealed this and the Fourth Circuit Court of Appeals in *United States v. Johnson*, 337 F.2d 180 vacated the judgment against appellant and remanded the case for retrial on Counts Two (2) through Eight (8) inclusive, those counts charging overt acts. The court stated that it was so doing because the mass of evidence and comment upon which appellant was found

[1] 18 U.S.C. 281 and 18 U.S.C. 371

guilty on *all* counts was so intermingled with evidence relating only to Count One (1), said Count One (1) being invalid as to appellant, as to infect the jury's entire verdict.

The United States petitioned for and was granted a writ of certiorari to this Court, and this Court thereafter remanded the case for retrial upon all counts but with all references to appellant's speech to be purged from the conspiracy charge.

After remand, appellant timely moved the District Court to dismiss the whole indictment alleging as ground therefor, bias infecting the grand jury's determination for the same reasons that infected the petit jury's determinations and because of alleged unfair and reprehensible conduct of the government in conducting the grand jury proceedings, and appellant further moved that court for leave to inspect the minutes of the grand jury.

The United States had theretofore revealed that the grand jury minutes involved in this matter exceeded 1,300 pages *and claimed that the question of the effect of the tainted evidence on Counts Two (2) through Eight (8) would unavoidably require an examination of the entire 1,300 page record.* (Emphasis added.) (Opinion of Chief Justice Warren, *United States v. Johnson*, 383 U.S. 169, at page 187).

The United States made various different representations to the District Court concerning how many of those 1,300 or more pages related to appellant's speech. These were "no more than 25 percent", "not in excess of 20 percent", "12, 15 or 20 pages out of about 160 pages", "by no means de minimis," "216 pages out of a little over 1,300".

The District Court Judge, despite the varying representations of the United States and the rejection of appellant's motion to view those very minutes, himself declined to look at them and without viewing them denied appellant's motion for dismissal of the indictment "as a matter of law," based upon the "record before me and not on the record and/or

decision of somebody else." (Transcript of proceedings of October 10, 1967, page 310). The court had already stated at page 311 that it would not read the minutes, saying,

> "*Not that I am unwilling to read it*, but I tried to keep, and so far, I believe, successfully, out of my knowledge anything which occurred previously with respect at least, to substance, so that my decision would be based completely on the record before me and not on the record and *or decision of somebody else*."

No judge prior thereto nor at any time thereafter has viewed, read, or looked at a single page of the grand jury minutes *but all have accepted the decision of the United States Attorney, "a somebody else,"* that those minutes are unbiased and not infected or contaminated by the substantial portions thereof which were incompetent to indict appellant of any crime or to convict him for the same.

Appellant duly took an appeal to the Fourth Circuit Court of Appeals raising therein the above issues and relying alternatively upon *Dennis v. United States*, 384 U.S. 855, which was decided subsequent to the decision of appellant's case by this Court, or alternatively upon the grounds related in his motion to establish a sufficient "particularized need" for the minutes, *Allen v. United States*, 390 F.2d 476.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, speaking through Judge Butzner disposed of appellant's right of access to the grand jury testimony sought without touching at all upon appellant's asserted rights to the same, by simply stating that there was no error in such refusal, basing its conclusion on the fact that appellant was allowed to inspect and copy *his* own grand jury testimony, and that he was also furnished the testimony of prosecution witnesses *after* their direct examination and of defense witnesses after they had testified, if the government intended to impeach them through use of

the grand jury testimony. The Court found this procedure adequate and ruled that *Dennis v. United States*, 384 U.S. 855 (1966) and cases following did not require disclosure of more of the grand jury minutes as a matter of right.

This overlooked completely, of course, appellant's purpose in seeking a full and complete opportunity to inspect the grand jury minutes which was to ascertain whether the grand jury had been biased or prejudiced as to Counts Two (2) to Eight (8) on which he was tried and convicted after his case was remanded to the District Court by this Honorable Court (*United States v. Johnson*, 383 U.S. 169 (1966)) affirming 337 Fed. 2d 180 (4th Circuit, 1964), he having moved timely for an order to dismiss the indictment and to inspect the grand jury minutes to support his motion from portions of those minutes *other* than the testimony of witnesses.

Appellant's contention here is that the Dennis case, supra, cited by the appellant in his motion in the District Court, is clear authority for the right he sought to exercise and that the District Court as well as the Court of Appeals was in basic error in not interpreting Dennis and later cases as affording appellant this right, in the absence of circumstances threatening some danger to the security of the United States. For reasons which will hereinafter appear, appellant will further show that apart from the ruling in *Dennis*, special and peculiar circumstances of the situation, in light of the decisions of the Court of Appeals and of this Honorable Court in connection with his first trial, made it imperative that the extent of the infection found by both Courts to have permeated his first trial, be traced to its origin and fully examined in order to ascertain how effective and damaging that evidence had been in the minds of the grand jurors.

The Court of Appeals likewise made a simple disposition of appellant's contentions with respect to the fact that the grand jury heard evidence relating to his congressional speech and the strong and persuasive argument that was

propounded to show the real necessity of examining the grand jury entire record, if his fundamental right to have his case considered by an unbiased grand jury was to be sustained.

It is significant that up until this very moment appellant has not even had the benefit of any court's examination of those minutes, let alone a viewing of the same by himself or his attorney to support his claim of bias. Thus he now stands convicted upon charges under an indictment sought and procured by a political foe without having any access himself to the record upon which he was indicted, and which record has been declined to be even examined by the court which ruled against his motion to quash that indictment, and his motion to have access to those minutes, and which same court later found him guilty of those charges.

The Court of Appeals in foreclosing this vital claim of appellant cited *Costello v. United States*, 350 U.S. 359, 363 (1956), as authority for its findings.

It is urgently represented to this Honorable Court that the Court of Appeals fatally misconceived the contention of appellant, applied an inapposite doctrine in so doing and failed to consider the powerful and moving considerations developed at length in his brief to the Court of Appeals in *support of the necessity of having the benefit of all that transpired in the grand jury room before he went on trial*, in light, as already stated, of the earlier findings of that Court and of your Honorable Court. That Court fell grossly into further error when it construed appellant's contention to be that he was entitled *absolutely* to the right of access to the grand jury minutes. This conclusion *completely misconceived appellant's alternative position*, which was that at the very least he had shown a particularized need for having this access without regard even to this Court's holding in *Dennis*.

[2] But at page 364 therein Justice Burton presumed that this court would not preclude examination of the grand jury record to ascertain bias or prejudice in an indictment.

There is no dispute regarding the meaning nor the scope embraced by the *Costello* case, but, it has no applicability whatsoever to appellant's position. *Costello* deals with "inadequate or incompetent evidence before the grand jury" (The words of Justice Black). Grand Juries have, from time immemorial, been exposed to irrelevant and incompetent evidence and for the cogent reasons pointed out in *Costello*, such cannot afford any basis for challenge.

The vast distinction between the principle contained in *Costello* and appellant's claim is best shown in the language of no less an authority than Justice Harlan (at P. 176) in writing the opinion of this Court in the government's appeal to it growing out of appellant's first trial. He stated:

> "The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissable evidence. The attention given to the speech's substance and motivation was not an incidental part of the government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence".

Further, and of the most over-riding importance, the evidence relating to the speech delivered by appellant had to be inextricably involved with the evidence relating to Counts Two (2) through Eight (8). Since it has been held that Count One (1) was "infected" with evidence which violated appellant's constitutional rights and that the infection permeated the trial of the remaining counts to a degree justifying your Honorable Court in voiding his conviction and remanding those counts for re-trial, it becomes highly significant and confirmatory of the wisdom of this holding, to consider the overt acts in Counts Two (2) through Eight (8).

Appellant's contention has been throughout these entire proceedings, that the payment of any fees to him was for professional services which he had performed and which had begun as early as the month of June, 1960, some *seven (7)* months before Mr. Robert Kennedy even assumed office as

Attorney General of the United States; so it is again urgently called to the attention of this Honorable Court that the highly significant and undisputed fact is that the first payment of the series of payments hereinafter listed was made to the appellant on June 20, 1960, and it is further undisputed that the first call made by the appellant on Robert Kennedy was not until about nine (9) months later. These events are in reality the crux of this controversy and appellant states that it is overwhelmingly significant that the "alleged crimes" which were committed, (the overt acts) did not occur until more than nine (9) months later than those planned, (the conspiracy) and such crimes were to influence an official *who was not even an official at the inception of the plan.*

There follows a listing of the two sets of counts which will demonstrate the results arrived at by the grand jury in voting on Count One (1) and the remaining counts.

Count One (Paragraph 20) Paragraph (20) deposit of check for $800.00 drawn March 31, 1961 by Robinson	Count Two Deposit of same check described in Paragraph (20)
Count One (Paragraph 28) Paragraph (28) deposit of check for $3,500.00 drawn May 2, 1961 by First Continental, etc.	Count Three Deposit of same check described in Paragraph (28)
Count One (Paragraph 36) Paragraph (36) deposit of check for $2,500.00 drawn May 25, 1961 by First Continental, etc.	Count Four Deposit of same check described in Paragraph (36)
Count One (Paragraph 38) Paragraph (38) deposit of check for $4,000.00 drawn June 7, 1961 by First Continental, etc.	Count Five Deposit of same check described in Paragraph (38)
Count One (Paragraph 48) Paragraph (48) deposit of check for $3,250.00 drawn June 28, 1961 by First Continental, etc.	Count Six Deposit of same check described in Paragraph (48)

Count One (Paragraph 50) Paragraph (50) deposit of check for $2,000.00 drawn August 4, 1961 by William L. Robinson	Count Seven Deposit of same check described in Paragraph (50)
Count One (Paragraph 59) Paragraph (59) deposit of check for $1,500.00 drawn September 12, 1961 by William L. Robinson	Count Eight Deposit of same check described in Paragraph (59)

A mere reading of the allegations contained in the substantive counts discloses that in each and every count Two (2) through Eight (8) inclusive, appellant is charged with the receipt of an identical payment as charged in Count One (1). Obviously, therefore, the evidence submitted to the grand jury in support of Count One (1) was not only inextricably interwoven with the evidence in support of at least a part of each of the substantive counts, but indeed, was identical. It was actually and it was precisely and beyond any possible question *the very same evidence*. In face of this, how can the substantive counts be isolated from the infectious and unconstitutional character of Count One (1) or the testimony offered in support of Count One (1)?

It is here that the patent distinction can be perceived between the holding in *Costello* and the instant case. We are not here concerned with *inadequate, incompetent or immaterial evidence.* *What we find here is the irrefragible link that ties together Count One on the one hand and the substantive counts on the other.* Even if Dennis had not been already decided at the time appellant made his motion for inspection of the grand jury minutes, the fact that the identical allegations regarding payment of money contained in the count which has been denounced by this Court are to be found in each of the remaining counts, would in itself have constituted the "particularized need", required to be shown, under the law *before* the *Dennis* case.

It could only be *by an inspection* and *analysis of the evidence* before the grand jury that appellant, or his counsel would know in what manner, in just what language, in just what order, in just what context the United States Attorney

offered evidence, for example, in support of Count One (1) (Paragraph 28) of a payment of $800.00 on March 31, 1961 and the connection of this payment to the making of the speech in order to be able to judge to what extent the grand jury was influenced, driven and moved by improper and unconstitutional references to that speech in voting on this count and the extent to which the testimony regarding that speech moved the grand jury to vote for Count Two (2) (Paragraph 20) charging, of course, the *identical payment, the identical, alleged illegal act.* What did the United States Attorney state or claim to the grand jury in relation and explanation thereunto?

It is respectfully submitted to this Honorable Court that the unequivocable holding by both the Court of Appeals and this Honorable Court finding *the speech* to be clear evidence of an infection of the whole trial proceeding, pointed in all logic, and in all common fairness, to the right, indeed the duty, of appellant to examine, to trace, to evaluate the extent and the legal effect of the constitutional infirmity *at the very inception* of the process namely, the validity of the whole indictment and whether the grand jury was truly unbiased, in view of the very unique and special circumstances here involved, the course which the government chose to pursue and because the government did not elect to submit Counts Two (2) through Eight (8) de novo, in an atmosphere free and clear of the prejudicial evidence relating to the speech.

Judge Sobeloff, when this matter was first before the Court of Appeals (337 Fed. 2d at P. 180) describes the extent to which appellant's first trial was surfeited with evidence relating to the speech. He stated (at page 204):

> "*Many of the events* testified to at the trial related *only* to the speech. It was introduced into evidence and its *authorship, contents, motivations and accuracy* made the subject of *extensive inquiry.* The conclusion is unavoidable that this *mass of evidence and comment*, all inadmissable against Johnson, infected the jury's consideration of his inno-

cence or guilt under the conflicts of interest counts." (Emphasis appellant's)

Here specifically and in the very words of the Circuit Court of Appeals on the first appeal hereof, is its clear and unequivocable statement of the link existing between the unconstitutional first count and the remaining counts, when that Court found that the "mass of evidence and comment, *all inadmissible against Johnson*", infected the jury's consideration under the conflict of interest counts. For the appellant not to have sought access to the entire record before the grand jury, in view of the Court's finding that the speech was "the subject of extensive inquiry" at the trial that there was a "mass of evidence and comment" relating to it and that this inadmissible evidence infected the jury's consideration of his innocence or guilt, and in view of the words of Mr. Justice Harlan that the constitutional infirmity infecting the prosecution was "not merely a matter of the introduction of inadmissible evidence", that the attention given to the speech's substance and motivation *was not an incidental* part of the government's case, would have displayed an almost bland disregard or lack of concern for his own rights by appellant.

The holding in *Dennis* is a weapon of defense with which the Supreme Court has armed all defendants, but a more ideal and urgent circumstance than the posture of appellant's case as the second trial began, or wherein there would be a more justifiable reason for this basic right to see grand jury minutes, just cannot be conceived. To deny this contention it is necessary to say that appellant was entitled to have his *conviction erased* because the petit jury was exposed to the contagion of Count One (1) of the indictment, but that the grand jury was meticulously shielded from any evidence of his speech on the floor of Congress, and was not in any manner or extent whatsoever impelled, biased or influenced into voting a true bill on Counts Two (2) to Eight (8), by reason of any such evidence. The hundreds and hundreds of pages in the record, surfeited as it must be with facts and exhibits relating to Count One (1) makes

such a presumption beyond the bounds of reason, and on the contrary, points to the exact opposite conclusion, to a virtual certainty that appellant's rights were more grossly prejudiced, biased and violated by submission of evidence in support of Count One (1) to the grand jury than was inflicted upon him by doing so to the petit jury. All that the appellant sought in the court below at his second trial was permission to look and see if this, in fact, had occurred, he having asserted substantial reasons as to why he, in good faith believed that the United States Attorney, in political rivalry, might have well brought about such a result, and he urges that refusal to grant this permission was a fatal denial of his rights.

Appellant's attempt to gain access to the grand jury's minutes was not an idle, routine or dilatory move. On the contrary, it was of transcendental importance to him because it went directly to the heart of his ability to defend himself at his second trial after the determinations of the Court of Appeals and of this Court of the errors in his first trial.

It is difficult to imagine a situation in which the holding of the Court of Appeals and of this Honorable Court in the government's own appeals disposing of appellant's first conviction, could have been of greater significance and value to him in his second trial.

Without belaboring the extent of Dennis as to whether or not a defendant is to have access to all grand jury minutes under all circumstances and conditions, appellant nevertheless asserts that in his case he established a sufficient "particularized need" for the minutes to have met the pre *Dennis* requirements.

Because of the "infection" to which the petit jury had been subjected, the court went to the length of voiding appellant's conviction and had remanded the case to the court below to be retried. It is a striking fact that appellant at his first trial at least had the benefit of being represented by able counsel where presumably there was some possibility of the "infection" in the minds of the jury being erased or obliterated. In light of this, the importance of

just exactly what had transpired before the *grand jury* simply cannot be over-estimated. Can it possibly or reasonably be said that the petit jury was *not immune* to the infection, but that the *grand jury was* a forum where, of course, appellant was not even present, where its whole direction and the matters submitted to it were under the complete domination and control of the U.S. Attorney and without a restraining hand or any voice of protest or objection from appellant?

CONCLUSION

For the reasons hereinbefore stated, appellant respectfully submits that he has been deprived of a proper judicial determination of the validity or invalidity of the indictment against him and that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Charles J. Steele,
Joseph Sharfsin,
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12,129

UNITED STATES OF AMERICA, Appellee,

-versus-

THOMAS F. JOHNSON, Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. R. Dorsey Watkins, District Judge.

(Argued October 10, 1969. Decided December 9, 1969)

Before SOBELOFF, BOREMAN, and BUTZNER, Circuit Judges.

BUTZNER, *Circuit Judge*:

Thomas F. Johnson appeals his conviction for violations of 18 U.S.C. § 281 (1958 ed.), the conflict of interest statute.[1a] He was found guilty on counts 2 through 8 of an

[1a] The portion of 18 U.S.C. § 281 (1958 ed), under which Johnson was convicted, provides:

> "Whoever, being a Member of . . . Congress, . . . directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be

indictment which charged that he, as a Congressman, had received payment for attempting to have the Justice Department dismiss a mail fraud indictment against the officers of a savings and loan association. Finding no error, we affirm.

This appeal concerns Johnson's second trial. He formerly was convicted on all counts of the indictment, including a conspiracy count which was based in part on a speech he made in Congress. We reserved, holding that the speech or debate clause of Art. I, § 6, of the United States Constitution barred conviction on the conspiracy count and that he should be granted a new trial on the other counts. The Supreme Court affirmed on the constitutional issue, but authorized Johnson's retrial on the conspiracy count with all reference to the speech eliminated.[2] On remand, however, the district court granted Johnson's motion, to which the government offered no objection, for dismissal of the conspiracy count. He was then tried by the court without a jury and found guilty on the remaining substantive counts which had nothing to do with his speech.

I.

Johnson contends that the counts of the indictment on which he was convicted are invalid because the grand jury that returned them heard evidence concerning his Congres-

fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

Section 281 was repealed in 1962. Substantially similar provisions are now contained in 18 U.S.C. § 203(a)(1964 ed.).

[2] United States v. Johnson, 383 U.S. 169 (1966), *aff'g* 337 F.2d 180 (4th Cir. 1964). The facts are fully set forth in these opinions and need not be repeated here.

sional speech. Johnson's argument, however, is foreclosed by authorities that we deem controlling.[3] In *Costello v. United States*, 350 U.S. 359, 363 (1956), Mr. Justice Black wrote:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

Johnson seizes on the term "unbiased grand jury" in *Costello*, and argues that the grand jury which indicted him was biased because it heard testimony of his Congressional speech. Bias of a grand jury may be manifested in several ways,[4] but it has not been held to arise from the receipt of incompetent or constitutionally impermissible evidence. *Costello* dealt with an indictment founded on hearsay evidence, but the rule it states is applicable to sustain an indictment returned by a grand jury that heard evidence obtained in violation of the Constitution.[5] Of course, the tainted

[3] Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1956); Holt v. United States, 218 U.S. 245 (1910); United States v. Blue, 384 U.S. 251, 255 n.3 (1966) (dictum).

[4] For example, in *Costello*, Mr. Justice Black illustrated this point by citing Pierre v. Louisiana, 306 U.S. 354 (1939), which dealt with the systematic exclusion of Negroes from the grand jury. See Costello v. United States, 350 U.S. 359, 363 n.7 (1956).

[5] Holt v. United States, 218 U.S. 245 (1910); see United States v. Blue, 384 U.S. 251, 255 n.3 (1966) (dictum).

evidence would not be admissible in the trial of the case, but this presents no problem here. The count of the indictment that dealt with the speech was dismissed, and the speech played no part in the proof of the remaining counts.

Johnson also argues that his appearance before the grand jury was involuntary, and therefore the indictment must be dismissed. The district judge conducted an extensive hearing on the motion to dismiss. The evidence disclosed, among other things, that Johnson is a lawyer who formerly served as a state prosecuting attorney. He is familiar with grand jury procedures, and he knew that his testimony before the grand jury could be used against him. Before his appearance, he conferred with officials of the Department of Justice, who informed him that he was a potential defendant and that if he testified he would have to appear voluntarily.

The district judge stated an abundance of historical facts that led to his ultimate findings that Johnson's appearance before the grand jury was voluntary, that he was fully aware that his activities were under investigation by the grand jury, and that his appearance before the grand jury was a calculated risk.[6]

We conclude that the district court properly denied Johnson's motion to quash the indictment.

II.

Johnson argues that recent decisions[7] allow automatic access to grand jury testimony and that no longer must a

[6]Even if the facts were otherwise, suppression of the tainted evidence at trial, instead of dismissal of the indictment, might be sufficient—a point which we need not decide here. See United States v. Blue, 384 U.S. 251, 255 n.3 (1966) (dictum).

[7]E.g., Dennis v. United States, 384 U.S. 855, 868 (1966); United States v. Amabile, 395 F.2d 47, 52 (7th Cir. 1968), *vacated on other grounds sub nom* Giordano v. United States, 394 U.S. 310 (1969);

defendant make a showing of particularized need for examining the grand jury's minutes. None of these decisions, however, require disclosure of all grand jury testimony as a matter of right. The Second and Seventh Circuits afford the broadest disclosure for the purposes of impeachment. There, in the absence of sound reasons for a protective order, a defendant may examine the grand jury testimony of a witness on subjects about which the witness testified at the trial.[8]

Johnson's access to grand jury testimony was adequate. He was allowed to inspect and copy his own grand jury testimony before trial. The government furnished the testimony of prosecution witnesses after their direct examination, and agreed to make available to Johnson the testimony of defense witnesses at the conclusion of their direct testimony if the government intended to impeach these witnesses through use of their grand jury testimony.

Johnson sought, but was denied, all grand jury testimony concerning his speech. We find no error in this. The count concerning the speech was dismissed. For the purposes of the motion to quash the remaining counts, the government conceded that testimony concerning the speech constituted about 17 per cent of all grand jury testimony. The district court's reasons, and ours, for sustaining the remaining counts do not rest on the premise that the testimony concerning the speech was insignificant. Recognizing that this evidence was a substantial part of all that the grand jury

Allen v. United States, 390 F.2d 476, 479 (D.C. Cir. 1968); United States v. Youngblood, 379 F.2d 365, 366 (2d Cir. 1967); Gibson v. United States, 403 F.2d 166, 168 (D.C. Cir. 1968)(dictum).

[8]United States v. Amabile, 395 F.2d 47, 52 (7th Cir. 1968), *vacated on other grounds sub nom.* Giordano v. United States, 394 U.S. 310 (1969); United States v. Youngblood, 379 F.2d 365, 366 (2d Cir. 1967). But see United States v. Davis, 410 F.2d 959, 961 (8th Cir. 1969).

heard, we have held, nevertheless, for the reasons stated in Part I, that the remaining counts are valid.

We also find no error in the district court's denial of Johnson's request for the grand jury testimony of defense witnesses. Here the need for impeaching evidence that underlies the reason for allowing access to the testimony of prosecution witnesses did not exist. Moreover, Johnson had a transcript of the testimony which defense witnesses gave at his former trial.

III.

We find no merit in a number of other errors Johnson assigns. They do not require extended discussion. Among them is his contention that 18 U.S.C. § 281 (1958 ed.)[9] is unconstitutional on the ground that it fails to require scienter. The indictment charged, and the district court expressly found, that Johnson acted "knowingly".[10] Johnson, however, argues that neither the indictment nor the court's findings can supply the missing element of scienter to the statute. Courts, however, can read scienter into a statute when it appears Congress implicitly intended that it must be proved. Cf., *Morissette v. United States*, 342 U.S. 246, 250 (1952). The statute punishes a Congressman

[9]Note 1, supra, contains the pertinent part of the statute.

[10]Pursuant to Fed. R. Crim. P. 23(c), the district judge specially found the facts, stating in part:

> "The Court, therefore, finds that the payments received by Johnson . . . were in substantial part . . . received knowingly by Johnson as a member of Congress for services rendered and to be rendered, as such member, in relation to a proceeding in which the United States was a party before the Department of Justice; and that his purported employment for other legal services was in large part a sham, to try to cover up the payments for his services before the Department of Justice."

who "receives . . . any compensation" for prohibited services. Compensation is "payment for . . . service rendered."[11] Thus it is clear that Congress did not intend to punish a Congressman for receiving a gift, contribution, or remuneration for a service not prohibited by the statute. Because receipt of money may or may not be condemned by the statute, it is reasonable to assume that Congress intended knowledge of the nature or purpose of the receipt to be a necessary element of the crime. Other courts have reached the same conclusion. *Taussig v. McNamara*, 219 F.Supp. 757, 760 (D.D.C. 1963), *cert. denied*, 379 U.S. 834 (1964); *United States v. Quinn*, 141 F.Supp. 622, 626 (S.D.N.Y. 1956). We hold, therefore, that the statute implicitly requires scienter.

Contrary to Johnson's assertion, the evidence is sufficient to support his conviction. His assignment of error concerning the destruction of F.B.I. notes was also raised in his first appeal, and we adhere to the discussion of the subject in our earlier opinion. *United States v. Johnson*, 337 F.2d 180, 201 (4th Cir. 1964).

The judgment is

AFFIRMED.

[11] Webster's Third New International Dictionary (1964).

APPENDIX B

JUDGMENT

United States Court of Appeals
for the
Fourth Circuit

No. 12,129.

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS F. JOHNSON,

Appellant.

Appeal from *the United States District Court for the* ___ *District of* ___ Maryland.

This cause *came on to be heard on the record from the United States District Court for the* ___ *District of* ___ Maryland ___, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* affirmed.

/s/ Samuel W. Phillips
Clerk

[Filed December 9, 1969]

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FILED
MAR 11 1970
JOHN F. DAVIS, CLERK

No. 1158

In the Supreme Court of the United States

OCTOBER TERM, 1969

THOMAS F. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 419 F. 2d 56.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to February 7, 1970, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ruling in petitioner's first appeal —that the speech or debate clause of the Constitution forbade the use in evidence of testimony concerning a speech that he gave as a Member of Congress in a prosecution under the general conspiracy statute —required the dismissal of substantive conflict-of-interest counts of the indictment, unrelated to the speech, on the ground that references to the speech tainted the grand jury's deliberations.

2. Whether, in support of his motion to dismiss the indictment, petitioner was entitled to the production of all grand jury testimony.

STATEMENT

Petitioner and three others were indicted in an eight-count indictment in the United States District Court for the District of Maryland. Count 1 charged a violation of the general conspiracy statute, 18 U.S.C. 371, based in part on the making of a speech by petitioner, while a Representative in Congress, on the floor of the House of Representatives. The other seven counts charged that petitioner, in violation of the conflict of interest statute, 18 U.S.C. 281, received fees to intercede with Justice Department officials to persuade them to postpone and dismiss an indictment. After a trial by jury, petitioner was convicted. The Court of Appeals for the Fourth Circuit reversed on

the ground that the speech or debate clause of Article I, Section 6 of the Constitution, bars a criminal conviction of a Congressman for accepting money to make a speech in Congress. It remanded for a new trial on the substantive counts, holding that evidence concerning the circumstances of this speech tainted his conviction on these counts. 337 F. 2d 180.[1] This Court affirmed the ruling of the court of appeals that the evidence received in the prosecution of petitioner under the general conspiracy statute contravened the speech or debate clause, but it held that the government was not precluded from retrying the conspiracy count if it eliminated all references to the speech aspect of the conspiracy. *United States* v. *Johnson*, 383 U.S. 169, 184-185. This Court did not review the court of appeals' determination that the substantive counts had to be retried because of the admission of evidence concerning the speech (*id.* at 185-186).

On remand, the district court dismissed the conspiracy count. Petitioner waived trial by jury and he was again convicted on the seven substantive counts. He was sentenced to imprisonment for six months on each count, the sentences to run concurrently. The court of appeals affirmed.

ARGUMENT

1. Petitioner contends that the indictment should have been dismissed because the grand jury heard testimony concerning the circumstances of his con-

[1] The convictions of the other defendants were affirmed.

gressional speech. As the court of appeals held, however, a defendant has no right to go behind an indictment, valid on its face, "returned by a legally constituted and unbiased grand jury," to challenge the evidence presented to the grand jury. *Costello* v. *United States*, 350 U.S. 359, 363; *Lawn* v. *United States*, 355 U.S. 339, 348-350; *United States* v. *Blue*, 384 U.S. 251, 255 n. 3; *Holt* v. *United States*, 218 U.S. 245, 247. The receipt of testimony about the speech did not make the grand jury biased. As the court of appeals observed, grand jury bias does not arise from the receipt of incompetent or constitutionally impermissible evidence.[2] Finally, a full answer to petitioner's claim that the substantive counts were invalidated by the testimony relating to the speech is found in the holding of this Court, on review of petitioner's first conviction, that the government was not even precluded from retrying the conspiracy count, purged of elements offensive to the congressional privilege. See 383 U.S. at 184-185.

2. Petitioner had adequate access to the grand jury minutes. He was allowed to examine his own grand jury testimony and the grand jury testimony of all government witnesses. Since the receipt of testimony about the speech before the grand jury furnished no ground for dismissing the indictment, there was no particularized need either for him to have access to all of the grand jury testimony or for the trial court to inspect the grand jury minutes.

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[2] On the motion to quash in the trial court the government pointed out that testimony relating to the speech constituted about 17 per cent of the grand jury testimony.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1970.

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